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In The

Supreme Court of the United States

October Term

No. 933

RUSSELL TROUTMAN, ET AL,

Petitioners,

versus

SARGENT SHRIVER, Director, Office of Economic Opportunity, and UNITED STATES OF AMERICA,

Respondents

MOTION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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O.B. McEWAN,
P.O. Box 753
Orlando, Florida, 32800
Counsel of Record for Petitioners
BRIAN C. SANDERS
P.O. Box 753
Orlando, Florida, 32800
and
PHILIP G. NOURSE
133-A North 4th Street
Ft. Pierce, Florida, 33450
Of Counsel for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 933

RUSSELL TROUTMAN, ET AL., PETITIONERS

v.

DONALD RUMSFELD, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, and UNITED STATES OF AMERICA

PETITION FOR REHEARING
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Russell Troutman, the Orange and Saint Lucie County Bar Associations, through their attorney, and move the Court for a rehearing under Supreme Court Rule 58(2), of the order denying their Petitions on February 24, 1970. Petitioners assign intervening, controling circumstances, i.e. the Court's May 3d decisions in ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC. v. CAMP, No. 85, and BARLOW v. COLLINS, No. 249. Such decisions create a conflict between this Court's rulings and the United States Fifth Circuit in the instant case. Rehearing is thus sought under SANITARY REFRIGER-

ATOR CO. v. WINTERS, 280 U.S. 30.

I.

ASSOCIATION OF DATA PROCESSING
v. CAMP

In this case the Fifth Circuit relied on "the recent 8th Circuit case of ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC. v.CAMP, 8. Cir, 1969 406 F2d 837" At page 31, 32 of the Petition, the Fifth Circuit in its opinion quotes from ASSOCIATION OF DATA PROCESSING the exact language this Court quoted and over ruled at pages 2 and 3 of its May 3d decision in No. 85 reversing the 8th Circuit.

This Court has now held the "legal interest" test goes to the merits. The Fifth Circuit answered the Bars' allegations of economic "injury in fact" from illegal solicitation of fee producing cases, and "other injury" from the use of NON-qualified sub-professionals to render legal services, thus:

> "The decisions of the courts appear to be uniform in denying standing to competitors who otherwise possess no legal right to be free from competition. See TENNESSEE POWER Co. v. TVA, 306 U.S. 118 . . ." (Pet. pg 31) (Emphasis supplied)

At pg 3 of the decision in No. 85, TENNE-

SSEE POWER CO. v. TVA, and its legal interest test is distinguished from the issue of standing. Yet the Fifth Circuit, in face of Troutman and Orange County Bar's allegations of imminent economic harm, and St. Lucie Bar's allegations of actual solicitation of fee producing cases (TR 51,52), applied the "legal interest test" and denied standing. Compare the St. Lucie Bar allegations of actual present injury by a present program "accepting fee-generating cases" at Transcript 52 with the ASSOCIATION allegations that American National Bank & Trust was now servicing two Data Systems Inc. customers, in light of the "injury in fact, economic or otherwise" test now prevailing! Article III standing clearly appears under the allegations.

In TROUTMAN the Bars invoked ABBOTT LABORATORIES v. GARDNER, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed2d 681 in response to the holding of the District Court that:

> "Under the Economic Opportunity Act of 1964, there is no provision allowing for a right of review for any party aggrieved and . . . thus no such right arises under the Administrative Procedure Act."(Pet. 41)

The Bars also raised the Administrative

Procedure Act, asking the District Court to hold that it gave a "right of review to any person . . . adversely affected or aggrieved . . "(Pet. 39)

The Fifth Circuit responded:

> "Appellants' reliance upon ABBOTT LABORATORIES v. GARDNER . . .is misplaced. . . Where legaly recognized rights such as the use or enjoyment of property are sought to be protected by imposition of a consultation requirement as a condition precedent to agency action, the individuals affected by agency non-compliance . . may have standing. . Appellants, however, have demonstrated no LEGAL RIGHTS sought to be protected by Congress . . "(Pet. 34, 35, Emphasis supplied).

This Court in No. 85, at pg. 6 noted The APA and the House Report providing "to preclude judicial review ..a statute ..must .. give clear .. evidence of an intent to withold (judicial review)" The Court then cites ABBOTT on pg 7. Both the District Court,and the Fifth Circuit in TROUTMAN rejected the view of the APA and ABBOTT adopted by this Court in No. 85, DATA PROCESSING SERVICE. The Fifth Circuit engrafted the "legal wrong" concept on ABBOTT, and is thus in direct conflict with this Court's ruling in

No. 85. In our petition, pg 19, we cite CHICAGO v. ATCHISON, T & S F R, 357 U.S. 77 on whether unauthorized practice limitions gave standing, given UNLAWFUL competition. In DATA PROCESSING SERVICE, pg 4, this Court cites CHICAGO for a proposition which, in light of the affected in fact rule, is analogous. We pray the Court to consider in the light of the "zone of interests" test of No. 85, and the "slight indicia" test of the Dissent (pg 8) the ICHORD Amendment history at Pet. pg 10. It is "arguable" that a condition precedent imposed because programs were submitted to O.E.O and approved on the MISREPRESENTATION OF LOCAL BAR APPROVAL, contemplated the local bars within the zone of THAT "non-economic" harm. "slight indicia" clearly appear in the cited history. Senator Cooper's remarks have no relation to the purpose of the ICHORD amendment in this regard. They concern the later COOPER amendment, regarding STATE Bars. They do not, on their face purport to exclude local bars from the "zone of consideration". Nor do they, on careful reading stand for the proposition that the SOLE purpose of ICHORD was to help the O.E.O. The "no veto" quote lost merit with the legal right rule.

The Bar's position is arguable, especially in view of the O.E.O.'s C.A.P. Memo 62 (which we pray the Court to Judicially Note as an Official Government Document promulgated under the mandate of ICHORD) which the Director now repudiates contrary to the directive of the Congress.

II

BARLOW v. COLLINS

In BARLOW the Fifth Circuit is again involved, as in TROUTMAN. The Fifth Circuit is reversed for applying the "legal right" test, rather than the "persons aggrieved in fact" test, set forth in the APA, which point was expressly urged upon the Fifth Circuit in TROUTMAN. At Pet. pg 12, and 13 the Bars cited the "valuable right" in a non-competitive right context rule of LEEDOM v. KLYNE, 358 U.S.184, 79 S. Ct. 180, 3 L. Ed. 2d 210, and at Pet. 15 expressly pose the effect of the APA in the non-competitive e.g. non-economic context. Compare, BARLOW, pgs 7 and 8. The Bars urged consistently from District Court (Pet. 39) at all levels, including this Court (Pet 13) that they were "aggrieved by agency action" within the meaning of a relevant statute i.e. the ICHORD amendment. Compare BARLOW

pg 6. Petitioners urge the Court that there is little distinction between the destruction of economic independence which confered standing in BARLOW and the destruction of Bar independence and servitude on individual lawyer's livelyhoods that will be worked if local bars are in practice rendered powerless to control government solicitation of fee producing cases.

Turning to the special opinion of Mr. Justice BRENNAN and WHITE, the Bars urge that they invoked the standing provisions of FLAST v COHEN, both in the Fifth Circuit (Pet. 29) and in this Court (Pet. pg 5, 21). If the sense of FLAST is that there is soley an Article III test, and that test is: whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues, how shall this denial be viewed by the public? Alledging economic injury "in fact", and on the same theory, and case authority Alabama tennant farmers possess that "adverseness which sharpens the presentation of issues, while the local bars and their members, officers of the Court on which it depends,

do not possess such abilities? There can be no question on this record but that this dispute has been presented in a genuine adversary context. Let the precision with which the Bars selected the issues, the statutes, and the case authority in September 1967, and preserved them as this Court thereafter vindicated that judgment first in ABBOTT, then in FLAST, and now in DATA PROCESSING SERVICE v. CAMP and BARLOW v. CAMP be the token of whether they have that "concrete adverseness which sharpens the presentation of issues on which the Court so largely depends .."

Mr. Justice Douglas dissented from the denial of the petition for certiorari. It would appear his conviction that the writ should have been granted, viewed in light of the cases later handed down by the Court, was proper.

Counsel certifies under Rule 58(2) that this Petition for rehearing is presented in good faith and not for delay, and is strictly confined to the intervening controlling circumstances, to wit: the effect of BARLOW V. COLLINS AN ASSOCIATION OF DATA PROCESSING SERVICES v. CAMP.

Respectfully Submitted

s/O. B. McEwan
O. B. McEwan
P. O. Box 753
Orlando, Florida

Brian C. Sanders and
Philip G. Nourse
of Counsel.

I certify that three (3) copies of Petition were served this 13th day of March, 1970, upon the Hon. Erwin N. Griswold.

s/O. B. McEwan
O. B. McEwan
P.O. Box 753
Orlando, Florida.